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No. 82-940

In The

Supreme Court of the United States

October Term, 1982

ELIZABETH ANDERSON HISHON,

Petitioner

vs.

KING & SPALDING,

Respondent

On Writ of Certiorari To The
United States Court of Appeals
For The Eleventh Circuit

BRIEF OF DALLAS ASSOCIATION OF BLACK WOMEN ATTORNEYS, DALLAS WOMEN LAWYERS ASSOCIATION, STATE BAR OF TEXAS WOMEN AND THE LAW SECTION, WOMEN'S ISSUES NETWORK, INC., BUSINESS AND PROFESSIONAL WOMEN'S CLUB OF DALLAS, INC., MEXICAN-AMERICAN BUSINESS & PROFESSIONAL WOMEN'S CLUB OF DALLAS, GREATER DALLAS SECTION OF THE NATIONAL COUNCIL OF JEWISH WOMEN, SOUTHERN METHODIST UNIVERSITY ASSOCIATION OF WOMEN LAW STUDENTS, WOMEN'S CENTER OF DALLAS, AS AMICI CURIAE

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Amici respectfully submit this brief in support of petitioner.

INTEREST OF AMICI

The Women's Issues Network is an association that encourages and supports individuals and organizations in the Dallas area in particular and in Texas in general to advocate equal opportunity and advancement for women. The members of the Network represent several dozen organizations, each of which seeks to promote human dignity. The Network coordinated the filing of this brief.

The Dallas Association of Black Women Attorneys, the Dallas Women Lawyers Association, the State Bar of Texas Women and the Law Section and the Southern Methodist University Association of Women Law Students are each associations of lawyers or law students that seek to encourage women to study and practice law, expand employment opportunities for women lawyers, remove barriers to effective participation by women lawyers in the bar, and inform the bar and public of issues affecting women and women lawyers. Each association regularly presents public programs and seminars, acts to influence legislation, and provides women lawyers and law students a network. The law students' association in 1975 through 1980 sued four Dallas law firms, in which suits it asserted that the firms' employment practices violated Title VII of the Civil Rights Act of 1964.

The Business and Professional Women's Club of Dallas, Inc. and the Mexican-American Business & Professional Women's Club of Dallas are not-for-profit corporations that promote the interests and economic self-sufficiency of business and professional women by seeking elimination of restrictive and discriminatory work laws and the adoption of equitable terms and conditions of employment. As do the associations, the clubs present programs and seminars, act to influence legislation, and provide a network for women.

The Greater Dallas Section of the National Council of Jewish Women is an association that, in the spirit of Judaism, is dedicated to furthering freedom and welfare in the Jewish and general communities. The members of the Council provide essential social services and present educational programs to the community. The promotion of equal opportunity for employment and advancement is one of the Council's priorities.

The Women's Center of Dallas is a not-for-profit corporation that seeks to change society's expectations of women through research, education, counselling and communication. Past activities of the Center include employment counselling, teaching entry skills, providing a job bank and promoting job sharing.

SUMMARY OF ARGUMENT

Statutory "construction" requires more than an examination of text and original understanding. It requires an examination of subsequent legislative and administrative understanding of the text; of the values supporting the text; and of the role and competence of the courts in enforcing the text. Nothing short of such an examination gives a complete statement of the law. The meaning, or plain meaning, of text is important, but reliance on the meaning of text alone is contrary to historical judicial decision-making.

An examination of each source of construction shows that under Title VII an employer may not deny an individual eligibility for partnership because she is female. A reading of Title VII according to common usage shows that working at a law firm, whether as a partner or as an associate, is employment. Being eligible for partnership is a privilege or opportunity of such employment.

The debates and the reports of the Congress in 1964, when Title VII was enacted, and in 1972, when Title VII received plenary consideration, show that Congress understood that, unless the text made an exception, no distinctions would be made between more valued and less valued positions of employment, and all privileges and opportunities of employment would be protected from discriminatory decision-making. It is plain from these debates and reports

that the most valued positions of the professions were included within Title VII.

In enacting Title VII, Congress furthered fundamental American values of equality and fairness. We as a nation believe that decisions are to be made on merit and not class. Distinctions between jobs in high places and jobs in low places contradict the nation's values.

The federal courts, and this Court in particular, have an historical role in protecting individual rights. The Congress understood that role in giving the federal courts the principle role of enforcing Title VII. There are no issues in partnering cases that are beyond the competence of the federal courts.

ARGUMENT

I. STATUTORY "CONSTRUCTION" REQUIRES AT LEAST FOUR INQUIRIES: A. MEANING OF TEXT; B. INSTITUTIONAL UNDERSTANDING OF TEXT; C. VALUES SUPPORTING TEXT; AND D. COURT'S ROLE AND COMPETENCE.

We are in a time, last apparent in the 1930's and 1940's, of vigorous discussion about the legitimacy of the Court's standards of review. The discussion is most well known in the area of constitutional decision-making, where the discussion generally has concerned the appropriate rules of "scrutiny" applied to official action affecting life and liberty. See, e.g., Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843 (1978); J. Ely, Democracy and Distrust (1980). The discussion is less well known in the area of statutory decision-making, where the discussion has concerned the appropriate rules of "construction." See, e.g., G.

Calabresi, A Common Law for the Age of Statutes (1982); Note, Intent, Clear Statements, and Common Law: Statutory Interpretation in the Supreme Court 95 Harv. L. Rev. 892 (1982). It is understatement to note that the commentators, and the Justices of this Court, differ widely about the legitimacy of standards of review — whether they be rules of "scrutiny" or rules of "construction" — based on sources other than text and original understanding.

To illustrate the issue of legitimacy in statutory decision-making, we might ask which of the following questions is the correct way of putting the issue in this case: Do the statutory words "privilege of employment" and "employment opportunit[y]" include eligibility for partnership? Did the Congresses that passed Title VII and that considered and amended Title VII, and the agencies that have enforced Title VII, understand that partnerships would not be discriminatorily denied? Do the values of fairness and equality that Title VII validated and furthered allow a distinction between less valued positions of employment and more valued positions? Do our courts have the role and the competence to prevent segregation of our most valued positions of employment?

Each way of putting the issue, we submit, is partially correct. While the Court in statutory decision-making (and analogously in constitutional decision-making) has often emphasized the plain meaning and original understanding of text, it has never limited itself to those sources for its rules of construction. This Court has considered also the post-original understanding of a legislature that has given a statute plenary consideration, as well as the understanding of the agency that has enforced the statute, see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 732-34 (1975);

the values from which the legislature drew and which the legislature in turn validated and furthered, see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 427-35 (1968); and the role and competence of the courts in enforcing the subject matter of the statutes, see *J. I. Case Co. v. Borak*, 377 U.S. 426, 433-34 (1964).

While what the Court has done does not necessarily justify its repetition, the Court's consistent use of sources beyond text and original understanding — and historical acquiescence in their use — show that the Court, and perhaps the nation too, have long accepted at least two ideas: First, statutory text (and analogously constitutional text) is not a complete statement of the law; our skills of legislation are too unrefined, our language too imprecise, and our society too dynamic, for that. Second, our courts are sufficiently competent and even sufficiently representative to use other sources; it is plain, for example, that our judges are chosen or elected more often for their understanding of values than for their skill at legislative research. Just as the Constitution did not enact Mr. Herbert Spencer's Social Statics, it did not enact the school of jurisprudence that glorifies the plain meaning rule. It is appropriate to recognize that the Constitution did not prohibit or even discourage the judges of our courts from doing what historically has been the province of judging.

The time limit for submitting, and the cost of printing, a brief make it impossible to explicate each of the sources of construction that amici believe are legitimate. As amici representing hundreds of professional women and men from Texas, we do wish to emphasize one source as especially worthy of examination. We submit that an examination of the values (not just the purposes) of a statute is within

the historical province of judicial decision-making. Values support the principles, policies and interests which form the discourse within and without our institutions. Courts must take care, as we all must, in finding and applying values, but they must not exclude them because of the delicacy of the task.

II. AN EMPLOYER MAY NOT DENY AN INDIVIDUAL ELIGIBILITY FOR PARTNERSHIP BECAUSE SHE IS FEMALE.

A. *Meaning of Text*

The text of Section 703(a) of the Civil Rights Act of 1964 provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) . . . to discriminate against any individual with respect to his . . . privileges of employment because of such individual's . . . sex . . .; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . . sex . . . .

Contrary to the court of appeals, we do not believe that the textual issue is whether a partner is an "employee." Cf. *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1963) (Section 703(a) not limited to "employees," past, present or potential). Under Section 703(a)(1), an "employer" may not discriminate against an "individual" regarding "privileges of employment." Under Section 703(a)(2), an "employer" may not deprive an "individual" of "employment opportunities" by discriminatorily classifying "employees or applicants for employment." Because under Section 701(a) and (b) an "employer" may be a partnership,

and because petitioner is an "individual," the textual issue is what are "privileges of employment" and "employment opportunities." Do they include eligibility for partnership? Is being a partner "employment"?

To answer these questions, it is appropriate to examine the common usage of the word "employment." The court of appeals, in deciding whether a partner is an "employee," examined the usage of "employee" at common law rather than in common usage. *Hishon v. King & Spalding*, 678 F.2d 1022, 1027-28 (11th Cir. 1982) ("traditional partnership principles"). But unless the text refers to a specialized usage instead of the common usage, which here it does not, and unless the institutional understanding refers to such a specialized usage, which here it has not, see pp. 9-10 *infra*, the common usage is proper.

In common usage, "employment" is an "activity in which one engages and employs his time and energies" and the "state of being employed," i.e., engaged. Webster's Third New International Dictionary 743 (P. Grove ed. 1966). As applied to Section 703(a), "employment" is the activity in which the individuals within the employer's enterprise are engaged and employ their time and energy. In the case of a law firm, the activity is the group practice of law. In common usage, both partners and associates are in "employment" at law firms.

"Privileges" and "opportunities" of "employment" quite simply are the privileges and opportunities arising out of the activity. In the case of a law firm, the privileges and opportunities include greater remuneration and, perhaps, greater control of case selection or direction. These privileges and opportunities arise commonly at several stages of "employment," at senior associateship, junior partnership, and senior partnership, and many stages in between.

The court of appeals' usage would distinguish positions of employment at entities, large and small, across the nation, and include the less valued positions within Section 703(a) and exclude the more valued positions. Indeed, under the court of appeals' approach, to determine whether an "associate" is an "employee," it would be important to know whether he or she draws a salary or draws only a share of what he or she brings in and/or works on. Under the court of appeals' approach, it would be important to know whether a partner supervises the associate or gives the associate a file and says, "I don't want to see it again." Under the court of appeals' approach, many "associates" at our largest firms would not be "employees." The text, in common usage, however, makes no such distinctions.

B. *Institutional Understanding*

The Congress and the agencies may show their understanding of the textual issue in at least three ways: The Congress may indicate whether the common usage or some specialized usage of textual words should be examined. The Congress may itself provide its understanding or some guidance as to its understanding of the textual issue. The enforcement agency's practice and interpretation may provide its understanding of the textual issue. The court of appeals rejected one of these sources and ignored the other two.

First, the Congress indicated that an examination of the common usage of words would give an understanding of text. During the Senate consideration Senator Clark, floor manager of Title VII, responded to a set of questions put by Senator Dirksen. Asked who an "employer" was, Senator Clark responded that "employer" was "intended to have its common dictionary meaning, except as expressly qualified by the act." 110 Cong. Rec. 7216 (Apr. 8, 1964). If "em-

ployer," a word *defined* in the Act, was to have its common dictionary meaning, then it is very likely that "employment," a word undefined, was to have its common dictionary meaning too. Nonetheless, the court of appeals dismissed Senator Clark's statement as "but a single remark." *Hishon v. King & Spalding*, 678 F.2d 1022, 1027 (11th Cir. 1982).

Second, it is plain both in 1964, when the Act was passed, and in 1972, when the Act received plenary consideration, that the Congress understood that, subject only to a few stated exceptions, no distinctions would be made between more valued and less valued positions of employment, and that all privileges and opportunities of employment were included within Section 703(a)'s protection. In 1964, the Congress stated that the entire Act was intended to be "general in application . . . ." H.R. Rep. No. 914, 88th Cong., 2d Sess., 2 U.S. Code, Cong. & Adm. News 2393 (1964). Within Title VII, the only positions of employment removed from coverage were certain positions of elective office, 42 U.S.C. 2000e(f), and in religious institutions, 42 U.S.C. 2000e-1, and positions with the United States and private membership clubs, 42 U.S.C. 2000e(b). The only privileges and opportunities removed from competition on the basis of merit were those subject to a bona fide seniority system, 42 U.S.C. 2000e-2(h), and those designated as preferential programs for Indians, 42 U.S.C. 2000e-2(i).

So well understood was Title VII's general application to employment, subject only to the above-described express exceptions, that in 1964 several members of the House Judiciary Committee noted Title VII's application to lawyers and law firms. H.R. Rep. No. 914, 88th Cong., 2d Sess., 2 U.S. Code, Cong. & Adm. News 2476 (1964) (views of Reps. Poff & Cramer); *id.* at 2516-17 (views of Reps. McCulloch et al.). And so well understood was Title VII's

continued general application that in 1972, an amendment was proposed and defeated to exclude certain professionals from coverage, namely, physicians and surgeons. 118 Cong. Rec. 3800-02 (Feb. 14, 1972) (colloquy of Sens. Ervin, Williams, Pastore & Javits).

Finally, the Equal Employment Opportunity Commission, an agency with enforcement responsibility over Title VII, has understood that an "individual" need not be an "employee" in order to complain under Title VII. It has held, for example, that an applicant for a license could complain against a state licensing board, notwithstanding the absence of an employer-employee relationship between the applicant and the board. EEOC Dec. 75-249, CCH EEOC Dec. ¶ 6457 (1975).

C. *Values*

The values that supported the Civil Rights Act of 1964, and Title VII in particular, were then, and are now, fundamental to the nation. There was "a growing recognition," the Congress said in 1964, "on the part of all of our people of the incompatibility of . . . discrimination with our ideals and the principles to which this country is dedicated." H.R. Rep. No. 914, 88th Cong., 2d Sess., 2 U.S. Code, Cong. & Adm. News 2393 (1964).

Supporting Title VII were the related values of equality and fairness. Title VII declared that distinctions based on race, color, religion, sex and national origin always, or nearly always, have no relation to the merits of an employment decision. As this Court has said: "The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . .

employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). At the same time, Title VII declared that important decisions in our society, at least respecting employment of individuals, are to be made on the merits. Criteria must be bona fide and necessary, not frivolous. As this Court has also said: "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

We as a nation have always believed, or said we believed, in equality and fairness, in rewarding merit and not class. We said in the Constitution that neither the United States nor any State may grant any "Title of Nobility." Art. 1, §§ 9, 10. The qualifications for our highest elective offices were simply citizenship, residency and age. We made it the national gospel that anyone could become President.

We have believed that anyone can "make it," that there are no positions or privileges that are beyond reach. If a person, black, brown, or white, female or male, has the skill and extends the effort, she or he can "rise to the top." It may be in sports. It may be in the arts. It may be in business. Or it may be in the professions. Horatio Alger takes many forms.

This Court has recognized that we believe in merit and not in class. It has not allowed our most valued institutions to be segregated. Compare *Mississippi University for Women v. Hogan*, 102 S.Ct. 3331 (1982) (nursing school); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (medical school), and *Runyon v. McCrary*, 427

U.S. 160 (1976) (private schools), with *Brown v. Board of Education*, 347 U.S. 483 (1954) (public primary and secondary schools). It is no accident that before *Brown* this Court decided *Sweatt v. Painter*, 339 U.S. 629 (1950) (law school). If everyone was to have an equal opportunity to be a lawyer, then everyone would have to have an equal opportunity to become qualified for law school.

The court of appeals' decision would recognize that our most valued positions and privileges of employment may be segregated by class and not merit. In the arts, we now have female orchestra conductors and company directors. In business, we now have female presidents and directors of major corporations. And in the legal profession, we now have female deans of law schools and female federal and state supreme court judges. But the court of appeals' decision would allow those who wish to classify by sex or other class to segregate such positions and privileges again.

Law schools, law firms, and the courts were once segregated by race, color, religion, sex and national origin. See C. Epstein, Women in Law (1981). There were quotas on the admission to law school of blacks and browns, women and Jews. There were gentile and Jewish law firms. Blacks brought suit to end law school segregation, *Sweatt v. Painter*, 339 U.S. 629 (1950), and generally women brought suit to end law firm segregation, *Kohn v. Royall, Koegel & Wells*, 496 F.2d 1094 (2d. Cir. 1974); *Southern Methodist University Association of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979); *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977) (Italian-American male). It would be tragic for the nation to return to the days of segregation in high places.

D. *Court's Role and Competence*

From the beginning this Court, and subsequently the lower federal courts, have had a prominent role in the protection of individual liberty. It is a role plain from the grant of jurisdiction in article III and the contemporary ratification of the Bill of Rights. See J. Choper, Judicial Review and the National Political Process c.2 (1980). It is a role more plain from the historical practice of the people and response of the courts.

In the Civil Rights Act of 1964, and in Title VII in particular, the Congress assigned to the federal courts the principle enforcement role. While an agency was formed to investigate, conciliate and sometimes litigate, the agency's findings were not to be binding, and its recommendations advisory only. The role assigned to the federal courts was similar to the role assigned to them in the Reconstruction legislation, where the Congress asked the courts to protect individual dignity, equality, and citizenship, and which the courts neglected for too long.

Title VII cases raise difficult issues, and cases involving selection of partners will be no exception. But the Court has been well able to decide difficult questions of standards, *Dothard v. Rawlinson*, 433 U.S. 321 (1977); of statistics, *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); of remedies, *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); and of confidentiality, *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981). There is nothing in any of the litigated lawyering cases that shows that the courts will be unable to decide the questions arising in such cases. To the contrary, it is likely that the courts will be well able to determine whether there has been a decision based on class and not the merits and will be well able to order that such decisions be made fairly and equally.

CONCLUSION

For the above reasons, amici submit that eligibility for partnership cannot be denied on the basis of race, color, religion, sex or national origin. We respectfully submit that the court of appeals' decision to the contrary should be reversed.

Respectfully submitted,

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